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12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

14 ART TOBIAS,

15 Plaintiff,  
16 v.

17 CITY OF LOS ANGELES, et al.

18 Defendants.  
19

Case No. 2:17-cv-1076-DSF-AS

**PLAINTIFF'S RESPONSE TO  
MOTION TO DISMISS FILED BY  
DEFENDANTS CITY OF LOS  
ANGELES, BORNE, COOLEY,  
SANCHEZ, ARTEAGA, CORTINA,  
MOTTO, AND PERE**

20  
21 DATE: March 26, 2018  
22 TIME: 1:30 p.m.  
23 DEPT: Courtroom 7D  
24 JUDGE: Hon. Dale S. Fischer  
25

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1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2           Plaintiff ART TOBIAS, by his attorneys, in response and opposition to the  
3 Motion to Dismiss Filed by Defendants City of Los Angeles, Sanchez, Arteaga,  
4 Cortina, Cooley, Borne, Motto, and Pere (“Defendants”) (Dkt. 68), states:

5                   **Introduction**

6           This Court granted Plaintiff leave to file a Second Amended Complaint  
7 (“SAC”) to add allegations concerning his due process claims under *Brady* and its  
8 progeny. Dkt. 66. Defendants’ current motion has nothing to do with the new facts  
9 in the SAC. Instead, and despite the fact that this Court already rejected their first  
10 attempt to dismiss the interrogation-related claims at the core of this suit,  
11 Defendant have attempted a second bite at the apple. What is lacking is any  
12 justification for a new result, or for why Defendants chose not to raise qualified  
13 immunity when they asked the Court to consider their previous motion to dismiss.  
14 Indeed, though nothing has changed about the clearly established law in 2012,  
15 Defendants now claim they are entitled to qualified immunity for their brazen  
16 misconduct. This second bite is telling; Defendants know that their objectively  
17 documented (and recorded) misconduct during Plaintiff’s interrogation is  
18 completely damning. Thus, Defendants’ motion must be seen for what it is: a  
19 desperate “Hail Mary” without any merit whatsoever.

20           Defendants’ second motion to dismiss is as doomed as their first, and repeats  
21 the same mistakes—they have ignored the totality of the allegations in the  
22 operative complaint; they have failed to accept Plaintiff’s facts, and the reasonable  
23 inferences drawn from them, as true; and they have simply ignored clearly  
24 established law. Because Plaintiff has well pleaded the denial of clearly established  
25

1 constitutional rights, Plaintiff respectfully requests that the motion be swiftly  
2 denied.<sup>1</sup>

### 3 I. Legal Standard

4 Under Rule 8, a complaint need only contain “a short and plain statement of  
5 the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2).  
6 When considering a motion to dismiss, courts determine whether the complaint  
7 “contain[s] sufficient factual matter, accepted as true, to state a claim to relief that  
8 is plausible on its face.” [O’Brien v. Welty](#), 818 F.3d 920, 932 (9th Cir. 2016)  
9 (quoting [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009) (internal quotes omitted)). “A  
10 claim has facial plausibility when the plaintiff pleads factual content that allows  
11 the court to draw the reasonable inference that the defendant is liable for the  
12 misconduct alleged.” [Iqbal](#), 556 U.S. at 678. Under this standard, a complaint need  
13 not identify every possible fact; “the pleading standard Rule 8 announces does not  
14 require ‘detailed factual allegations.’” [Id.](#) (quoting [Bell Atlantic Corp. v. Twombly](#),  
15 [550 U.S. 544, 555 \(2007\)](#)). And, “[a] party need not plead specific legal theories  
16 in the complaint, so long as the other side receives notice as to what is at issue in  
17 the case.” [Sagana v. Tenorio](#), 384 F.3d 731, 736-37 (9th Cir. 2004) (quoting [Am.](#)  
18 [Timber & Trading Co. v. First Nat’l Bank](#), 690 F.2d 781, 786 (9th Cir. 1982)).

19 Defendants have raised a defense of qualified immunity, which requires this  
20 court to determine whether the facts taken in the light most favorable to Plaintiff  
21 state a constitutional violation and whether that violation was clearly established at  
22

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23 <sup>1</sup> Defendants have asked this Court to take judicial notice of the appellate decision overturning  
24 Plaintiff’s conviction as well as a state statute and the California Court rules. Plaintiff does not  
25 believe these are the sorts of things that require “judicial notice”—the Court is of course entitled  
to consider authorities, statutes, and rules. But the things Defendants ask the Court to take  
judicial notice of are completely irrelevant to the substance of their motion.

1 the time of the violation. *Tolan v. Cotton*, 134 S. Ct. 1861, 1865-66 (2014).

2 Regarding whether a right was “clearly established,” the “salient question . . . is  
3 whether the state of the law’ at the time of an incident provided ‘fair warning’ to  
4 the defendants “that their alleged [conduct] was unconstitutional.” *Id.* (quoting  
5 *Hope v. Pelzer*, 536 U.S. 730 (2002)).

6 The Supreme Court has emphasized the “the importance of drawing  
7 inferences in favor of the nonmovant, even when . . . a court decides only the  
8 clearly-established prong of the standard.” *Id.* at 1866. In addition, the inquiry is  
9 context-specific, and “officials can still be on notice that their conduct violates  
10 established law even in novel factual circumstances.” *Hope*, 536 U.S. at 741; *cf.*  
11 *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir.2011) (en banc) (emphasizing that  
12 if “qualified immunity provided a shield in all novel factual circumstances,  
13 officials would rarely, if ever, be held accountable for their unreasonable  
14 violations” of the constitution).

## 15 **II. The Second Amended Complaint**

16 Plaintiff describes the process of his interrogation through the course of over  
17 12 pages in the Second Amended Complaint (“SAC), involving over 50 different  
18 paragraphs. *See* SAC, Dkt. 67, ¶¶ 58-118. In short, the SAC sets out in rich detail  
19 how Defendants’ misconduct violated Plaintiff’s constitutional rights during his  
20 interrogation and caused his wrongful conviction. Rather than reiterating that  
21 extensive narrative here, Plaintiff incorporates his allegations by reference;  
22 particular allegations are discussed as necessary to respond to specific arguments.

### III. Defendants Have Again Misconstrued The Complaint

Defendants' argument section begins with a confusing jumble. They first state that their motion is "very narrow" and focuses only on the actions during Plaintiff's interrogation. Dkt. 68, at 4. Defendants then claim: "Plaintiff's first three claims [*i.e.*, Counts] are all derived from his interrogation." Dkt. 68, at 4. This statement is extremely misleading, and in fact wrong: as discussed below, Plaintiff's first two counts relate to his interrogation, but his third count—due process claims for the fabrication and suppression of evidence—is focused primarily on other constitutional violations. Then to further confuse matters, Defendants' qualified immunity argument is focused only on one aspect of Count I: Plaintiff's claim stemming from his invocation of his right to counsel. *See* Dkt. 68, at 4-5 (arguing only that it was "not 'clearly established' [] that a reasonable officer would have understood Plaintiff's statement 'Could I have an attorney? Because that's not me' to constitute an unequivocal request for legal counsel"). Defendants' brief then goes on to discuss qualified immunity on this issue alone, *id.* at 6-11, yet ends with the claim that "the Defendant officers are entitled to qualified immunity for Plaintiff's first three claims," *id.* at 12. What Defendants argue and what they ask for are two different things, and the lack of clarity is itself

a basis for dismissal. *See, e.g., Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) (argument waived for “failure to present a specific, cogent argument”).<sup>2</sup>

To bring some clarity to the issue, Defendants are right that their motion to dismiss on the basis of qualified immunity is narrow—it focuses on one theory of one count—but it does not even come close providing any argument about the first three counts in their entirety.

For one, as explained in the prior Memorandum, Dkt. 27, at 5, Count I alleges two theories of liability: (1) that Defendants coerced his confession by overcoming his will in violation of the Fifth Amendment, *and* (2) that they denied his right to counsel after Plaintiff specifically asked for an attorney. SAC, Dkt. 67, ¶¶166-172; *compare also id.* at ¶¶ 100-04 (describing Plaintiff’s invocation of his right to an attorney), *with id.* at ¶¶105-118 (describing coercive techniques). These two theories have entirely separate bodies of law that govern them. *E.g., compare Schneekloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973), *with Davis v. United States*, 512 U.S. 452, 458 (1994). Defendants’ motion is focused on just one of these two theories—the invocation of the right to counsel. So, even assuming Defendants were somehow right that the law related to invocation of the right to counsel was not clearly established (they are not, as set forth below), they could at most knock out one of two standalone theories of liability under Count I.

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<sup>2</sup> Further confusing matters, Defendants use occasional language suggesting their motion is one for failure to state a claim under Rule 12(b)(6). *See, e.g.,* Dkt. 68, at 4 (stating that Plaintiff’s allegations related to the interrogation “are still insufficient to support any claims against Defendants, and characterizing qualified immunity argument as “in the alternative”), 5 (citing legal standard for failure to state a claim). But no such argument can be found in the brief. And in any event the Court previously denied Defendants’ motion to dismiss Plaintiff’s interrogation-related claims. Dkt. 33. The additions in the SAC to add a *Brady* claim related to the suppression of an alternate suspect do nothing to change the calculus, and indeed Defendants’ motion makes no such argument.

1 Indeed, Plaintiff's coerced confession theory in Count I turns on the *totality*  
 2 of the circumstances. See [Schneckloth, 412 U.S. at 225-26](#); [Blackburn v. Alabama,](#)  
 3 [361 U.S. 199, 206 \(1960\)](#). This includes the circumstances surrounding Plaintiff's  
 4 interrogation, from beginning to end, and including Plaintiff's request for counsel  
 5 (even if it were not, as it is, an invocation of counsel that constitutes a standalone  
 6 constitutional tort); Plaintiff's requests to speak to his mother; the lies they told  
 7 Plaintiff; screaming and cursing at Plaintiff; refusing to obtain a waiver; Arteaga  
 8 putting his hands on Plaintiff; and the list goes on. In other words, even accepting  
 9 Defendants' argument on the narrow issue in their renewed motion, the Second  
 10 Amended Complaint would survive, as would Count I; and even all of the same  
 11 facts and circumstances related to the invocation would be relevant discovery.

12 Despite this being a second bite at the apple, Defendants fail to cite any of  
 13 this law, let alone explain why it was not clearly established at the time of the  
 14 events at issue here. Dismissal on qualified immunity grounds is therefore  
 15 unavailable. See, e.g., [Williams v. Rodriguez, 2017 WL 511858, at \\*9 \(E.D. Cal.](#)  
 16 [Feb. 8, 2017\)](#) ("Undeveloped arguments that are only argued in passing or made  
 17 through bare, unsupported assertions are deemed waived." (quoting [Christian](#)  
 18 [Legal Soc. Chapter of Univ. of California v. Wu, 626 F.3d 483, 487 \(9th Cir.](#)  
 19 [2010\)](#))); accord [Salazar v. City of Maywood, 414 F. App'x 73, 75 \(9th Cir. 2011\)](#).  
 20 In short, given their failure to cite the law or make any sort of adequate argument  
 21 concerning the coercion claim, and given the prior denial of a motion to dismiss  
 22 this identical claim, Defendants' motion is a waste of resources for both the Court  
 23 and the parties.

Count II, as a completely distinct claim, alleges that Defendants' actions violated his Fourteenth Amendment due process rights because their tactics "shock the conscience." *Id.* at ¶¶173-78. Again, this claim has its own set of governing law, and that law is distinct from the two Fifth Amendment doctrines concerning voluntariness and invocation of counsel that are at play in Count I. *See, e.g., Crowe v. County of San Diego*, 608 F.3d 406, 431-32 (9th Cir. 2010); *Stoot v. City of Everett*, 582 F.3d 910, 924-25, 928-29 (9th Cir. 2009). The Court recognized this as well in its prior ruling on the motion to dismiss. *See* Order, Dkt 33, at 7. Again, Defendants have not cited any of the authorities that govern this Count, let alone explained why they were not clearly established.

Finally, Count III—the due process claim that encompasses Plaintiff's fabrication of evidence and *Brady* claims—is not about the *interrogation* techniques being unlawful. Instead, it is about Defendants' fabrication and suppression of evidence, including the "substance of Plaintiff's oral confession" and "reports purporting to memorialize Plaintiff's confession." SAC, Dkt. 67, at ¶¶36. Again, fabrication of evidence and suppression of evidence under *Brady* are completely distinct from either of the two theories advanced in Count I. *See, e.g., Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc)). And, yet again, Defendants invocation of qualified immunity does not cite or consider any of this law, let alone explain why it was not clearly established at the time of Plaintiff's trial.

In the end, Defendants have overstated their position, even while trying to claim that their motion is "narrow." They have sought qualified immunity on one

theory of Count.<sup>3</sup> The confusion, and lack of clarity as to argument and purpose, is particularly bothersome given that Defendants are attempting a second motion to dismiss on an issue that could have been raised earlier and even after being handed a roadmap to Plaintiff's claims in the prior briefing and in this Court's order.

#### **IV. Defendants Are Not Entitled To Any Relief Concerning Plaintiff's Coercion Claim**

##### **A. It Was Clearly Established in 2012 That Defendants Were Prohibited from Coercing Plaintiff's Confession and That They Were Required To Consider His Age During the Interrogation**

The Supreme Court and Ninth Circuit have repeatedly reiterated the clearly established and decades-old rule that interrogations that are coercive or overbear the will of the suspect violate the Fifth Amendment, and that whether such a violation occurred is measured from the totality of the circumstances. *See Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) (emphasizing that the inquiry "must be broad," and emphasizing that the consideration of voluntariness "be based upon consideration of the totality of the circumstances" (quoting *Fikes v. Alabama*, 352 U.S. 191, 197 (1957)); *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973) (confession is not "the product of an essentially free and

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<sup>3</sup> Nevertheless, out of an abundance of caution, Plaintiff will address the other theory in Count I—that the Defendants overbore Plaintiff's will. But, given the lack of argument about the allegations in the complaint and the underlying law relevant to Counts II and III, those counts are not discussed herein. Suffice it to say, it was beyond clearly established in 2012 that Defendants could not use interrogation techniques that "shock the conscience," or fabricate police reports concerning Plaintiff's identification and interrogation, or suppress evidence of alternate suspects and impeachment. *See, e.g., Crowe*, 608 F.3d at 432-33; *Devereaux*, 263 F.3d at 1074-76 ("[C]onstitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government . . . is virtually self-evident"); *Tennison v. City & Cnty. of San Francisco*, 570 F.3d 1078, 1093 (9th Cir. 2009) (failure to disclose information concerning alternative suspect clearly violates *Brady*); *Barker v. Fleming*, 423 F.3d 1085, 1095 (9th Cir. 2005).

1 unconstrained choice by its maker”” and ““if his will has been overborne and his  
 2 capacity for self-determination critically impaired, the use of his confession  
 3 offends due process.”” (quoting Culombe v. Connecticut, 367 U.S. 568, 602  
 4 (1961)). Defendants have not cited any of these cases.

5 It was also beyond well-established in 2012, when Defendants committed  
 6 their misconduct here, that interrogators were required to consider the unique  
 7 characteristics of the person they were interrogating, and that such characteristics  
 8 absolutely—and unequivocally—include the suspect’s age and other juvenile  
 9 factors. *See, e.g. J.D.B. v. North Carolina*, 564 U.S. 261, 275-76, 277 (2011) (in  
 10 evaluating custodial interrogation, “[n]either officers nor courts can reasonably  
 11 evaluate the effect of objective circumstances that . . . are specific to children  
 12 without accounting for the age of the child subjected to those circumstances”); In  
 13 re Gault, 387 U.S. 1, 55 (1967) (stating that “special problems may arise with  
 14 respect to waiver of the privilege by or on behalf of children” and that “the greatest  
 15 care must be taken to assure that the admission was voluntary, in the sense not only  
 16 that it was not coerced or suggested, but also that it was not the product of  
 17 ignorance of rights or of adolescent fantasy, fright or despair”); Miller v. Fenton,  
 18 474 U.S. 104, 109-10 (1984) (whether conduct is “coercive” must be evaluated  
 19 under the “particular circumstances of the case,” including the “unique  
 20 characteristics of [the] particular suspect”); Gallegos v. Colorado, 370 U.S. 49, 54  
 21 (1962) (it would be a “callous disregard of . . . constitutional rights” to treat every  
 22 suspect like “an adult in full possession of his senses and knowledgeable of the  
 23 consequences of his admissions”); Haley v. Ohio, 332 U.S. 596, 599-600 (1948)  
 24 (plurality opinion) (“What transpired would make us pause for careful inquiry if a  
 25

1 mature man were involved[, a]nd when, as here, a mere child—an easy victim of  
 2 the law—is before us, special care in scrutinizing the record must be used”).

3 Put differently, it has “long been established that the constitutionality of  
 4 interrogation techniques is judged by a higher standard when police interrogate a  
 5 minor.” Crowe, 608 F.3d at 431 (citing In re Gault, 387 U.S. at 55); see also  
 6 Gallegos, 370 U.S. at 54 (noting that “a 14-year-old boy, no matter how  
 7 sophisticated, is unlikely to have any conception of what will confront him when  
 8 he is made accessible only to the police”). Indeed, in Stoot v. City of Everett, as it  
 9 concerned an interrogation almost a decade before the one in this case, the Ninth  
 10 Circuit held: “At the time of the interrogation, [the officer] was on notice under  
 11 clearly established law that if he failed to provide [plaintiff] with appropriate  
 12 *Miranda* warnings or physically or psychologically coerced a statement from  
 13 [plaintiff], the use of the confessions could ripen into a Fifth Amendment  
 14 violation.” 582 F.3d 910, 927 (9th Cir. 2009). That is precisely what happened  
 15 here.

16 In short, this law is more than sufficient to provide Defendants with fair  
 17 notice that they could not overbear Plaintiff’s will and that they were required to  
 18 consider his age when interrogating him.

### 19 **B. Defendants’ Attempt to Ignore the Totality of the Circumstances** 20 **Should Be Rejected**

21 As explained above, the Defendants have not clearly articulated a basis for  
 22 seeking qualified immunity concerning the Fifth Amendment coerced confession  
 23 claim. The only place that appears to invoke law that could be applicable to this  
 24 claim is in 3 paragraphs of their motion. Dkt. 68, at 10. There, Defendants state  
 25 that “[p]resumably, Plaintiff will also argue that his interrogation was somehow

1 inappropriate, separate and apart from his purported request for legal counsel or his  
 2 mother.” *Id.* This statement is difficult to understand because Plaintiff has been  
 3 beyond clear—in the original complaint, in the First Amended Complaint, in the  
 4 memorandum concerning the prior motion to dismiss, and in the SAC—that he has  
 5 alleged a coercion theory apart from his right to counsel claim, both of which are  
 6 pleaded in Count I (Fifth Amendment claims). *See, e.g.*, Dkt. 27, at 5; SAC, Dkt.  
 7 67, ¶¶166-172. The Court noted this as well. *See* Order, Dkt. 33, at 6 (“The FAC  
 8 alleges Defendants continued to question him after he requested an attorney *and*  
 9 used coercive interrogation tactics to elicit a confession that was used against him  
 10 in a criminal proceeding.”) (emphasis added).

11 In those three paragraphs, Defendants argue: (1) police officers may lie to  
 12 suspects to induce a confession; (2) the Defendants’ use of suggestive questions  
 13 was not improper; and (3) the Plaintiff’s denial of some suggestions by detectives  
 14 suggests “his will was not overcome by their strategy.” Dkt. 68, at 10. But, as it  
 15 concerns the first to arguments, even if Defendants are correct those specific tactics  
 16 are not *per se* unlawful, that is not the relevant inquiry. What matters here is the  
 17 totality of the circumstances, and the fact that the officers used deception and  
 18 suggestive questions is certainly part of that totality, but not the whole.

19 Defendants’ argument is therefore misplaced because it seeks to isolate what must  
 20 be considered in totality. It would be different, perhaps, if the only facts Plaintiff  
 21 gave for alleging that his will was overborne were merely that the officers used  
 22 deception or suggestive questions, but that is certainly not the case here. Instead, in  
 23 50 paragraphs of factual allegations, Plaintiff has set out a series of events and  
 24  
 25

1 circumstances that, in the end, overbore Plaintiff's will. *See* SAC, Dkt. 67, at ¶¶  
 2 58-118.<sup>4</sup>

3 As a final matter, Defendants' argument that Plaintiff's denials "suggest[]  
 4 that his will was not overcome by their strategy," Dkt. 68, at 10, can be quickly  
 5 disregarded. The very use of the term *suggestion* reveals the impropriety of this  
 6 argument on a motion to dismiss. Indeed, it contradicts the substance of the  
 7 complaint and certainly the inferences that flow from the allegations. *Cf. Tolan,*  
 8 *134 S. Ct. at 1866.*

9 **V. Defendants Are Not Entitled to Qualified Immunity on the Right to**  
 10 **Counsel Claim.**

11 **A. It Was Clearly Established in 2012 That Defendants Were**  
 12 **Required To Cease Questioning When Plaintiff Invoked His Right**  
 13 **To Counsel**

14 Defendants do not seem to quarrel with the proposition that, in 2012, it was  
 15 clearly established that questioning should cease after a suspect invokes his right to  
 16 an attorney. *See Smith v. Illinois, 469 U.S. 91, 98 (1984)* (describing the "rule that  
 17 *all* questioning must cease after an accused requests counsel" (emphasis in  
 18 original, cite omitted); *Fare v. Michael C., 442 U.S. 707, 719 (1979)* ("[A]n  
 19 accused's request for an attorney is *per se* an invocation of his Fifth Amendment  
 20 rights, requiring that all interrogation cease."). For present purposes, that should

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21 <sup>4</sup> As a further note, it bears mentioning that Defendants are just simply wrong when they suggest  
 22 that "all of the actions of which [Plaintiff] complains are approved and valid interrogation  
 23 techniques." These are not *all* of the actions Plaintiff complains of; Plaintiff has alleged that  
 24 Defendants made threats, made promises of leniency, and even made "physical contact to  
 25 convince Plaintiff to confess." SAC, Dkt. 67, at ¶¶110. These are not "valid interrogation  
 techniques." *See, e.g., Brown v. Mississippi, 297 U.S. 278, 286 (1936)* (physical force cannot be  
 used to extract a confession); *Rodriguez v. McDonald, 872 F.3d 908, 924 (9th Cir. 2017)* (threats  
 and promises of leniency made interrogation involuntary).

1 end the matter—Plaintiff has alleged that his invocation was unambiguous, as well  
 2 as facts supporting that claim, and Defendants do not challenge these allegations in  
 3 any way, nor could they at this stage.

4 Defendants nonetheless suggest that it was not clearly established that they  
 5 needed to take into account the fact that they were interrogating a 13-year old. Dkt.  
 6 68 at 7. This, it appears, is why they have emphasized the portions of the Court of  
 7 Appeals decision overturning Plaintiff’s conviction that discuss Plaintiff’s age. But  
 8 this argument is foreclosed by the precedent cited above: it was beyond well  
 9 established in 2012 that interrogators had to take account of the juvenile nature of  
 10 their suspects, particularly those who were nowhere near the age of majority just as  
 11 Plaintiff was. *See supra*, Part IV, at 8-10; (citing [J.D.B.](#), 564 U.S. 261 (2011); *In re*  
 12 [Gault](#), 387 U.S. 1, 55 (1967); [Miller](#), 474 U.S. 104, 109-10 (1984); [Gallegos](#), 370  
 13 [U.S. 49, 54 \(1962\)](#); [Crowe](#), 608 F.3d 406, 421-23 (9th Cir. 2010)); *see also* [barn](#)  
 14 [Rodriguez v. McDonald](#), 872 F.3d 908, 922 (9th Cir. 2017) (“Where the suspect is  
 15 a minor, the analysis necessarily considers his ‘age, experience, education,  
 16 background, and intelligence, and ... whether he has the capacity to understand the  
 17 warnings given him, the nature of his Fifth Amendment rights, and the  
 18 consequences of waiving those rights.’ (quoting [Fare v. Michael C.](#), 442 U.S. 707,  
 19 [725 \(1979\)](#))).

20 Defendants next suggest that Plaintiff’s invocation was “equivocal.” This  
 21 argument fails. For one, Plaintiff’s statement “Could I have an Attorney? Because  
 22 that’s not me” is exactly what it looks like—a request for an attorney. Indeed,  
 23 [Davis v. United States](#), which Defendants cite, is clear that “if a suspect *requests*  
 24 *counsel* at any time during the interview, he is not subject to further questioning  
 25

1 until a lawyer has been made available or the suspect himself reinitiates  
 2 conversation.” [512 U.S. 452, 458 \(1994\)](#) (emphasis added). That is exactly what  
 3 Plaintiff did here. Plaintiff did not mention an attorney in the abstract or in passing.  
 4 Plaintiff did not ask the officers about *whether* he should get an attorney. Plaintiff  
 5 did not make his request conditional. Instead, he asked for an attorney directly.

6 The clearly established test, derived from *Davis*, is certainly satisfied by the  
 7 allegations in the complaint. Under *Davis* someone being interrogated need only  
 8 “articulate his desire to have counsel present sufficiently clearly that a reasonable  
 9 police officer in the circumstances would understand the statement to be a request  
 10 for an attorney.” *Id.* at 459. Indeed, the focus is on whether or not a suspect  
 11 specifically “requests counsel” as opposed to making an “ambiguous reference” to  
 12 an attorney. [United States v. Washington, 462 F.3d 1124 \(9th Cir. 2006\)](#).

13 Here, the complaint alleges that Plaintiff “unambiguously invoked his right  
 14 to an attorney after being show[n] the video and subject to lengthy interrogation.”  
 15 SAC, Dkt. 67, at ¶101. The SAC further alleges that Plaintiff specifically asked a  
 16 question: “Could I have an attorney? Because that’s not me.” *Id.* Then, “rather than  
 17 ceasing all questioning, the Defendants pressed on, telling Plaintiff “No, don’t  
 18 worry.” *Id.* at 102. There is nothing ambiguous about a request for counsel that  
 19 states “Could I have an attorney” because I’m being wrongly accused. Any  
 20 objectively reasonable officer would know that this was a request, and the law was  
 21 clearly established at the time. *See, e.g., Alvarez v. Gomez, 185 F.3d 995, 998 (9th*  
 22 [Cir. 1999\)](#) (““Can I get an attorney right now, man?”... ” “... ‘You can have  
 23 attorney right now?’” is an unequivocal invocation”) “... ‘Well, like right now you  
 24 got one?’ ”]; [United States v. De La Jara, 973 F.2d 746, 750 \(9th Cir.1992\)](#)  
 25

(holding that “Can I call my attorney?” was an invocation of right to counsel); [Smith v. Endell](#), 860 F.2d 1528, 1529, 1531(9th Cir.1988) (holding that “Can I talk to a lawyer?” was not ambiguous or equivocal).

As must be emphasized, Defendants have ignored the other facts in the complaint, and the inferences that must flow in Plaintiff’s favor at this juncture, in at least two ways. First, in their analysis, Defendants have completely ignored powerful evidence of how they *actually* responded to Plaintiff’s request for an attorney. They did not ask Plaintiff to clarify. They did not ask Plaintiff what he meant by his request. Instead, they brazenly pushed ahead and specifically responded to Plaintiff’s request by saying: “No.” The fact that Plaintiff specifically asked for an attorney and was given a specific answer—no—is clear evidence that the invocation was unequivocal. Indeed, it is evidence not only that a reasonable officer would have seen the question as a request for an attorney, but that Defendants themselves did as well.<sup>5</sup> At a minimum, these facts are sufficient to show that a reasonable officer in 2012 interrogating a 13-year-old would have “understood the statement to be a request for an attorney.” [Davis](#), 512 U.S. at 459.

Second, Defendants have ignored the fact that the complaint can only capture part of what actually occurred. As accurately alleged in the complaint, the video “provides context and information that goes beyond the cold transcript of the complaint,” and shows that the interrogation was truly unconscionable. *See* SAC, Dkt. 67, at ¶58-60. This context too, and the inferences to be drawn from it in

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<sup>5</sup> Defendants’ table of cases involving statements deemed unequivocal is largely a distraction. For one, the state-law cases are irrelevant. And, the federal cases are actually telling for what they do not show. In none of those cases have Defendants pointed to an instance where someone, and in particular a minor, specifically asked for an attorney—Could I have an attorney?—as Plaintiff did here. Clear requests, like the one here abound in the case law, too. *See supra*, at 14; *see also, e.g., Rodriguez*, 872 F.3d at 114 & 921-24.

1 Plaintiff's favor, further supports the well-pleaded allegations that the invocation  
 2 was unambiguous, which is all that is required. [Cf. Tolan, 134 S. Ct. at 1866.](#)

### 3 **B. Defendants' Remaining Arguments Fail Entirely**

4 As a last-ditch effort, Defendants advance a number of irrelevant arguments  
 5 for qualified immunity that tellingly do not have to do with the status of federal  
 6 constitutional law at the time of the interrogation. Perhaps Defendants make these  
 7 arguments now to offer some justification for their failure to raise any purported  
 8 qualified immunity defense in their original motion to dismiss. In any event, the  
 9 arguments are baseless.

10 First, citing the California Rules of Court, Defendants suggest that the fact  
 11 that the California Court of Appeals published its decision in Plaintiff's case  
 12 somehow means that the decision "established a new legal standard for  
 13 determining when a minor has invoked his right to counsel." Dkt. 68, at 9. This  
 14 argument is frivolous. For one, Defendants have no idea as to why the appellate  
 15 court decided to publish its decision; if they want to make this argument they need  
 16 to depose the jurists who decided the case. And, they have overlooked the myriad  
 17 reasons why a decision might be published; for example because a case "involves a  
 18 legal issue of continuing public interest" or because a decision "makes a significant  
 19 contribution to the legal literature." Cal. Rules of Court, Rule 8.1105(c)(6)-(7).  
 20 This sort of speculation is not a basis for seeking qualified immunity.

21 Second, Defendants cite a new California statute concerning juvenile  
 22 interrogations and state that this "suggests that qualified immunity is appropriate,  
 23 as the law was not clearly established in 2012." Dkt. 68, at 9 n.4. This argument is  
 24 also frivolous. Indeed, Defendants themselves have cited authorities illustrating  
 25

1 that “whether the governmental official violated a state law or an internal  
 2 department policy is not the focus of the qualified immunity inquiry.” Dkt. 68, at  
 3 7 (quoting [Case v. Kitsap County Sheriff’s Dept.](#), 249 F.3d 921, 929 (9th Cir.  
 4 [2001](#))) (alterations omitted).

5 Third, Defendants suggest that the mere fact that the trial court got it wrong  
 6 and was reversed by the appellate court somehow implies that the law was unclear.  
 7 But, this is not the appropriate standard. Qualified immunity does not turn on  
 8 whether a state trial court made a mistake,<sup>6</sup> and we certainly do not know the  
 9 subjective reasons *why* that happened.<sup>7</sup> Instead, the focus is on whether the conduct  
 10 was unlawful at the time of the misconduct.

### 11 **Conclusion**

12 For all of the reasons above, Defendants’ motion to dismiss Counts I, II, and  
 13 III on the basis of qualified immunity should be denied.

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19 <sup>6</sup> Defendants have cited no authority for the proposition that the mere reversal of a decision  
 20 means that the underlying right was not “clearly established” for the underlying police officers.  
 21 For good reason: instances where the Ninth Circuit or Supreme Court have reversed lower courts  
 22 for improperly applying the “clearly established” inquiry illustrate that Defendants theory lacks  
 23 any basis in the law. Indeed, the entire idea of AEDPA review, which asks whether appellate  
 24 courts have unreasonably applied clearly established law, suggests that even jurists can get it  
 25 wrong, and do so in significant, “unreasonable” ways. 28 U.S.C. § 2254; *see, e.g., McWilliams v.*  
*Dunn*, 137 S. Ct. 1790, 1799-1801 (2017) (granting habeas relief); *Rodriguez*, 872 F.3d at 114 &  
[921-24](#) (granting habeas on coerced juvenile confession).

<sup>7</sup> For example, the state trial court here was not presented with the video interrogation in making  
 its determination.

Respectfully submitted,

**ART TOBIAS**

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